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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARTHA ALVAREZ, Plaintiff, v. WELLS FARGO BANK, N.A., Defendant.	Case No. CV 12-09661 JGB (RZx) **ORDER (1) GRANTING DEFENDANTS' MOTION TO DISMISS (DOC. NO. 13); AND (2) VACATING THE FEBRUARY 4, 2013 HEARING** **[Motion filed on December 12, 2012]**

Plaintiff Martha Alvarez brings this action asserting eight claims related to the pending trustee's sale of her residence. Before the Court is a Motion to Dismiss filed by Defendant Wells Fargo Bank, N.A. ("Wells Fargo"). (Doc. No. 13.) The Court finds Defendant's Motion appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After reviewing and considering all papers filed in support of and in opposition to the Motion, the Court GRANTS Defendant's Motion WITHOUT LEAVE TO AMEND.

I. BACKGROUND

A. Allegations in the Complaint

On January 2, 2008, Plaintiff took out an adjustable rate mortgage on her residence for $860,000, executing a Note secured by a Deed of Trust in favor of lender World Savings Bank, FSB ("World Savings"), to which Wells Fargo is presently the successor in interest. (First Amended Complaint ("FAC") ¶¶15, 19, Ex. D ("Deed of Trust").) The World Savings agent allegedly represented to Plaintiff that she would receive a 30-year fixed-rate mortgage loan but did not disclose to Plaintiff that the loan had a finance charge of $1,665,027.56 and that the principal balance of the loan would increase. (FAC ¶¶ 15, 16.) Plaintiff attempted to modify her loan, but Defendant or agents thereof denied her application to do so on six occasions. (Id. ¶ 17.) Defendant recorded a notice of default and notice of trustee's sale of the property; the sale date is currently pending. (Id. ¶ 18.)

B. Procedural History

Plaintiff through her counsel filed her original Complaint on October 1, 2012, in the California Superior Court for the County of Los Angeles, alleging claims for

1. Violation of California Bus. & Prof. Code § 17200 et seq.;
2. Unfair and Deceptive Business Practices in Loan Servicing;
3. Unfair and Deceptive Business Practices in Foreclosure Process;
4. Fraud in Loan Origination;
5. Set Aside Pending Trustee's Sale Based on Wrongful Foreclosure Proceedings (Cal. Civ. Code § 2923.5);
6. Violation of RESPA;
7. Breach of Implied Covenant of Good Faith and Fair Dealing;
8. Cancelation of Void Contract and Restitution;
9. Quiet Title; and
10. Declaratory Relief

(Compl., Ex. 1 to Not. of Removal (Doc. No. 1).)

Defendant removed the action to this Court on November 9, 2012. (See Not. of Removal.) On November 16, 2012, Defendant filed a Motion to Dismiss and a Motion to Strike (Doc. Nos. 7, 8), both of which were mooted by Plaintiff's FAC (Doc. No. 10), filed on December 7, 2012, and alleging claims for

1. Unfair or Deceptive Business Practices in Loan Origination;
2. Unfair or Deceptive Business Practices in Loan Servicing;
3. Unfair or Deceptive Business Practices in Foreclosure Process;
4. Fraud in Loan Origination;
5. Breach of Implied Covenant of Good Faith and Fair Dealing;
6. Cancelation of Void Contract and Restitution;
7. Quiet Title; and
8. Declaratory Relief

Defendant then filed its Motion to Dismiss Plaintiff's FAC ("Motion") on December 21, 2012. (Doc. No. 13.) Plaintiff filed her Opposition on January 7, 2013. (Doc. No. 18.) Defendant replied on January 14, 2013. (Doc. No. 20.)

C. Request for Judicial Notice

Defendant filed a Request for Judicial Notice ("RJN") (Doc. No. 14) with its Motion on October 9, 2012, requesting the Court to take judicial notice of (1) a Certificate of Corporate Existence dated April 21, 2006, issued by the Office of Thrift Supervision, Department of the Treasury ("OTS"), certifying that World Savings was a federal savings bank; (2) the Charter of Wachovia Mortgage, FSB; (3) an OTS letter authorizing a name change from World Savings to Wachovia; (4) the Official Certification of the Comptroller of the Currency stating that Wachovia converted to Wells Fargo Bank Southwest, N.A., which then merged with and into Wells Fargo Bank, N.A; (5) a printed webpage from the Federal Deposit Insurance Corporation showing the history of Wachovia; (6) a Deed of Trust recorded on January 2, 2008; (7) a Fixed-Rate Mortgage Note signed by Plaintiff on December 24, 2007; (8) a Notice of Default recorded on July 30, 2009; (9) a Notice of Trustee's Sale recorded on May 21, 2012; (10) and California Department of Real Estate license information regarding Plaintiff.[1]

A court may take judicial notice of court filings and other matters of public record. See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir.

[1] The Court lists only those exhibits on which it relies in this Order.

2006) (citing Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998)). Defendant has provided reference numbers for these documents, showing that they were in fact recorded; this demonstrates that the documents are public records. See Grant v. Aurora Loan Servs., Inc., 736 F. Supp. 2d 1257, 1264 (C.D. Cal. 2010) (collecting cases); Velazquez v. GMAC Mortg. Corp., 605 F. Supp. 2d 1049, 1057-58 (C.D. Cal. 2008). The Court grants judicial notice of these documents.

II. LEGAL STANDARD

A. Dismissal Under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that the Federal Rules require that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." (quoting Fed. R. Civ. P. 8(a)(2))); Bell Atl. Corp. v. Twombly, 550 U.S.

544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

Although the scope of review is limited to the contents of the complaint, the Court may also consider exhibits submitted with the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings," Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988)

III. DISCUSSION

A. Sufficiency of the Complaint

1. Plaintiff's Claims are Preempted by the Home Owners' Loan Act

Wells Fargo contends that all of Plaintiff's claims should be dismissed because they are state law claims preempted by the Home Owners' Loan Act ("HOLA"), as World Savings was a federal savings bank regulated by the Office of Thrift Supervision ("OTS"). (See Mot. at 2-5; RJN, Ex. A, C.) The OTS "occupies the entire field of lending regulation for federal savings associations." 12 C.F.R. § 560.2. The Ninth Circuit has found that HOLA confers on OTS "broad authority to issue regulations governing thrifts." Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1005 (9th Cir. 2008) (citing 12 U.S.C. § 1464). "As the principal regulator for federal savings associations, OTS promulgated a preemption regulation in 12 C.F.R. § 560.2." Id. The regulations implementing HOLA described the following types of state law as preempted by HOLA: terms of credit, including amortization or loans; disclosure, including laws requiring specific information and statements; and "processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." See 12 C.F.R. § 560.2(b)(4, 9, 10).

"In addition to the mandate in § 560.2(a) and (b), OTS has outlined a proper analysis in evaluating whether a state law is preempted under the regulation. . . . When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted." Silvas, 514 F.3d at 1005. All Plaintiff's state law claims are of the type specifically listed as preempted by HOLA's paragraph (b). See Silvas, 514 F.3d at 1006 (finding claim under California Business and Professions Code section 17200 for misrepresentation and misstatements preempted by HOLA); Ayala v. World Savings Bank, FSB, 616 F. Supp. 2d 1007, 1016 (C.D. Cal. 2009) (finding fraud claim preempted by HOLA); Curcio v. Wachovia Mortg. Corp., 2009 WL 3320499, at *6 (S.D. Cal. Oct. 14, 2009) (findings claims premised on the defendant bank's failure to modify the loan preempted by HOLA). Thus, the Court finds all Plaintiff's claims fall within the category of laws specifically preempted by HOLA. Were this not so, however, Plaintiff would still fail to state a claim under Rule 12(b)(6) for the reasons set forth below.

2. Failure to Tender Bars Plaintiff's Equitable Claims

Defendant argues that Plaintiff's claims are barred by her failure to tender. (Mot. at 14-15.) Plaintiff

asserts that it would be an undue hardship to require her to tender and inequitable because the loan arose as a result of Defendant's fraudulent conduct. (Opp'n at 10.)

Generally, a debtor challenging a foreclosure sale is required to make a tender or otherwise offer to pay the full amount of his debt. See Sierra-Bay Fed. Land Bank Ass'n v. Superior Court, 227 Cal. App. 3d 318, 337 (1991); U.S. Cold Storage v. Great W. Sav. & Loan Ass'n, 165 Cal. App. 3d 1214, 1225 (1985); see also Alicea v. GE Money Bank, No. C. 09-00091 SBA, 2009 WL 2136969, at *3 (N.D. Cal. July 16, 2009) ("When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secured debt."). This rule is rooted in equity and premised on the notion that "[i]t would be futile to set aside a foreclosure sale on the technical ground that notice was improper, if the party making the challenge did not first make full tender and thereby establish his ability to purchase the property." U.S. Cold Storage, 165 Cal. App. 3d at 1225.

Exceptions to the tender rule do exist. In Onofrio v. Rice, 55 Cal. App. 4th 413 (1997), the court held that tender may not be required where it would be "inequitable to do so" or "the action attacks the validity of the underlying debt." Id. at 424. There, the court affirmed

the lower court's decision not to require a tender where the person who purchased the plaintiff's property at foreclosure was the plaintiff's own foreclosure consultant who represented that he would assist her in avoiding foreclosure. In Lona v. Citibank, N.A., 202 Cal. App. 4th 89 (2011), the court reaffirmed these exceptions to the tender rule, noting "if the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt." Id. at 112-13.

Plaintiff, as elaborated below regarding her fraud claims, does not attack the validity of the debt itself, but argues only that Defendant failed to inform her about certain terms of the loan. Procedural violations are not the type of inequitable circumstances that qualify a debtor for an exception to the tender rule. See Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 578 (1984) ("It is settled that an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security."), cited in Grant v. Aurora Loan Servs., Inc., 736 F. Supp. 2d 1257, 1269 (C.D. Cal. 2010). In addition, as set forth below, Plaintiff has failed to allege sufficiently that Defendant committed fraud. Thus, there is nothing inequitable about requiring tender in this instance.

To be valid, tender must be unconditional and for the full amount of the debt. Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 580 (1984). The ability to pay is an implicit requirement. Karlsen v. Am. Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 118 (1971). Plaintiff in her FAC neither alleges that she is ready and willing to pay the full amount of the debt, nor that she is financially able to do so. Plaintiff in fact states that requiring her to tender would be "a hardship." (Opp'n at 10.)

Plaintiff's failure to allege a credible offer of tender is fatal to her equitable claims.

3. Failure to State Fraud Claims

Plaintiff in her "fraud in loan origination claim" alleges that "Plaintiff had no knowledge of the negative amortization component of the loan and had no way of discovering the undisclosed loan terms because of the deceptive manner in which the loan documents were drafted until Plaintiff received the Notice of Trustee Sale which put her on notice of the substantial increase in the loan balance." (FAC ¶ 66.) In addition, Plaintiff's three claims for violation of California Business & Professions Code § 17200 are based on Defendant's allegedly fraudulent conduct. (See FAC ¶¶ 31-40 (deception in loan origination); 52, 54 (deception in loan servicing); 58-61

(deception in foreclosure process).) Plaintiff fails to adequately allege a claim for fraud.

First, under California law, the elements of a fraud claim are false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages. Hackethal v. Nat'l Cas. Co., 189 Cal. App. 3d 1102, 1111 (1987). The crux of Plaintiff's argument is that the Wells Fargo agent "did not disclose and Plaintiff was not aware that, among other things, the loan had a finance charge of $1,665,027.56, and that the principal balance of the loan would dramatically increase." (FAC ¶ 16.) "[T]o establish fraud through nondisclosure or concealment of facts, it is necessary to show the defendant was under a legal duty to disclose them." OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp., 157 Cal. App. 4th 835, 846 (2007). Here, Plaintiff cannot show that Defendant owed her a duty of care or a specific duty to disclose.

A duty of care may arise through statute or contract; it may also be premised upon the relationship between the parties or the general character of the activity in which the defendant engaged. J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 803 (1979). The existence of a duty of care is an issue of law. Mintz v. Blue Cross of Cal., 172 Cal. App. 4th 1594, 1610 (2009). Generally, lenders and

servicers do not owe a duty of care. See Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1093 (1991). Plaintiff fails to point to any special relationship or special kind of activity that bestowed a duty of care upon Defendant. Further, Plaintiff's assertion that she sufficiently states a fraud claim because the "complexity of the loan documents . . . concealed the terms of the loan" and because of Defendant's "superior knowledge" of these terms is belied by Plaintiff's experience as a real estate salesperson licensed in California. (See RJN, Ex. K.) Plaintiff does not allege that Defendant made any false representations and Plaintiff cannot allege that Defendant owed her a duty of care; she thus cannot allege any of the remaining elements of fraud. See Hackethal, 189 Cal. App. at 1111.

Second, Plaintiff fails to show adequately that her fraud claims are not time-barred. Under Cal. Civ. Proc. Code § 338(d), the statute of limitations for a fraud claim is three years. Plaintiff argues that her claims are not time-barred because a fraud claim "is not deemed to have accrued until the discovery of the facts constituting the fraud by the aggrieved party. . . As a result of the compounding half-truths, misrepresentations, omissions, and Defendant's failure to provide the loan documents in a timely fashion, Plaintiff

was not aware of the actual loan terms and Defendant's fraudulent actions." Nevertheless, Plaintiff fails to set forth this delayed-discovery argument with sufficient facts, as she does not "specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." CAMSI IV v. Hunter Technology Corp., 230 Cal. App. 3d 1525, 1536-1537 (1991); id. ("Mere conclusory assertions that delay in discovery was reasonable are insufficient and will not enable the complaint to withstand general demurrer."). Therefore, the Court finds that Plaintiff fails to meet her burden of showing that she fraud claims are not time-barred.

4. Failure to State a Claim for Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiff claims that Defendant breached the implied covenant of good faith and fair dealing by denying and not properly reviewing her loan modification applications. (See FAC ¶¶ 81-86.) While loan modifications in California are preferred where appropriate (see Cal. Civ. Code § 2923.6 (encouraging lenders to offer loan modifications to borrowers in appropriate circumstances)), Defendant was not under any obligation to offer Plaintiff a loan modification. The "implied covenant of good faith and fair dealing is

limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." Pasadena Live, LLC v. City of Pasadena, 114 Cal. App. 4th 1089, 1093-94 (2004). Plaintiff fails to allege anything regarding the express terms of the contract, nor can she given that the note and Deed of Trust are silent on a right to loan modification but expressly provide Defendant with the right to foreclose on Plaintiff's subject property due to default. (See RJN, Exs. F, G.)

B. Leave to Amend

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). A district court can deny leave "where the amendment would be futile . . . or where the amended complaint would be subject to dismissal." Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991) (citations omitted); see also Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998). "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

As set forth above, Plaintiff's claims, all brought under California law, are preempted by HOLA. Were this not so, Plaintiff would still fail to plead facts sufficient to state a claim under Rule 12(b)(6). Thus, as the Court finds that any amendment to the pleadings would be futile, the Court dismisses Plaintiff's FAC without leave to amend.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion to Dismiss Plaintiff's First Amended Complaint WITHOUT LEAVE TO AMEND.

Dated: January 31, 2013

JESUS G. BERNAL
United States District Judge